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THE RETIREMENT OF MR. JUSTICE MILLER.

It is a matter for great regret to all the sections of the Madras Bar that the services of an eminent Judge like Mr. Justice Miller should so soon be lost to the Madras High Court. The opinion has been for some years unanimous and has latterly gathered strength that the public had in him an exceptionally able and sound judge, an opinion shared both by experts and by non-experts, by the bar as well as by the litigant public. We are glad therefore that the learned Advocate-General on behalf of the Bar generally and the President of the Vakil's Association (Mr. Rosario) on behalf of the vakils gave felicitous expression to the sentiments of deep satisfaction entertained by the Profession with his work and regret at his departure. Rarely, indeed, has a judge received such unique honor; and if we may say so with respect, the honor was well earned. The legal profession in India has been covertly attacked from within occasionally and has openly been attacked from without always. Nobody claims for it perfection or immunity from faults and foibles, but when all is said there can be no denying the fact that it is animated by a spirit of justice and fairness and by high ideals which may or may not be equalled but certainly are not surpassed by other institutions and last Friday's function was a proof that the ideals of the profession stand as high to day as they ever did.

Mr. Justice Miller was a Judge of versatile ability, of keen intellectual power and full of hard work day after day. He was remarkably quick in following the arguments that were addressed to him in the most complicated case whether they were well or ill put; at the same time he displayed a great degree of patience in hearing which did not dull the alertness of his intellect. This rare combination enabled him to sift a case thoroughly and to arrive at sound conclusions in a very large number of cases.

His lordship was equally at home in law and in fact whether the case was one relating to accounts or boundaries. As an appellate judge he was neither eager to reverse nor eager to

confirm judgments of the courts of first instance. While he respected the good points of a badly written judgment of a lower Court he brushed aside the weak points of a well written judgment. His memory was highly retentive. He had a grasp of legal principles and possessed a sound legal instinct. He was *facile princeps* in dictating oral judgments and in summing up briefly but without omission the points of a protracted argument lasting many days.

His Lordship had of course his limitations. That his temper was uncertain was often felt and occasionally and unexpectedly experienced. He laid down propositions of law which were not always sound. The syllogism which he constructed in *Kandukuri Mahalakshmamma* v. *Secretary of State for India*[1] was neither sound nor weighty:—There cannot be any ownership of water flowing in a river. Riparian owners therefore do not own the waters of the river. The water of the river and therefore the river are the property of the Government. Nor can his views in *Muthukumarasami* v. *Emperor*[2] that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that there is danger and not safety in not considering the evidence of accomplice witnesses exactly in the same way as that of other witnesses, are certainly not propositions which can be regarded as models of soundness.

Lastly though his Lordship had great gifts of humor we cannot congratulate him on his humorous attack upon the Bar at last year's Bar Dinner. It was long drawn out and made some at least think it was seriously meant.

On the whole we cannot but feel that a great loss has been sustained by his retirement and his personality will be missed for many a day to come by all the members of the Profession. He has left behind him a tradition of keen legal acumen, unsparing work and of courteous patience which will long be remembered. We wish him God speed and long life for useful work in his new sphere and retirement to enjoy his well-earned rest.

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1. (1911) I. L. R. 34 M. 296 2. (1912) I. L. R. 35 M. 454.

ANNIE BESANT v. NARAYANIAH. 27 M. L. J. 30.

There has latterly grown up a tendency in some of the Judgments of the Privy Council towards a discursive and hazy examination of the issues presented before the tribunal of ultimate resort, instead of the anxious precision and the lucid directness which used to characterise many of the judgments of an earlier day. The result has been that the judgments have again and again introduced elements of confusion, and speculation and uncertainty in the ascertainment of Indian law. Single sentences or passages can be found in the latter day judgments which have given rise to a whole crop of litigation and which have not contributed to make Indian law more certain and Indian litigation less expensive and harassing.

One remembers, as if it was yesterday, the decision of the Judicial Committee in the case of *Sheo Shankar Lal* v. *Debi Sahai*[1] where with respect to the devolution of Stridhanam the judgment was one way and the decree the other way. The logical result of the judgment was that a daughter's daughter was a preferential heir to the Stridhanam property of a woman; while the decretal part made the daughter's son the preferable heir. This capital discrepancy between the *ratio decidendi* and the conclusion naturally led to considerable difficulties of interpretation which are illustrated by the opposed opinions of the Madras High Court in *Subramanian Chetti* v. *Arunachalam Chetti*[2] and of no less an authority than Mr. Mayne in S. 675 of his Hindu Law, where he roundly taxes the Madras High Court with not understanding the line taken by the Privy Council. Again such an accurate judge as the late Lord Macnaghten undoubtedly went astray when he said that a revision petition to the High Court under S. 622 C. P. C. against a decree following upon an award was plainly barred by Art. 158 of the 2nd schedule to the Limitation Act which allows a period of ten days, for an application to set aside an award after it is submitted to the Court under S. 522 of the old code of Civil Procedure. See *Ghulam Khan* v. *Mohammad Hassen*[3]. Then again there is the obscurely expressed decision of the Privy Council in *Thakur Tribuvan Singh* v. *Rameshwar Baksh Singh*[4] dealing with Art. 118 of the Limitation

1. (1903) I.L.R. 25 A. 468. 2 (1904) I. L. R. 28 M. 1.
3. (1901) I.L.R. 29 C. 167.
4. (1906) L.R. 33 I. A. 44=16 M. L.J. 440=10 C. W. N. 1065.

Act which was considered to have upset a long current of decisions but the exact meaning of which it was impossible for one to ascertain with any degree of confidence till their Lordships later decision in *Umarkhan* v. *Niazudin* [5]. Quite recently in the *Medur case*[1] Lord Moulton in the course of a long judgment remarkable at once for its brilliant phrasing, general maxims and vague conclusions on the points dealt with made one clear statement which unfortunately is clearly inaccurate. He said "In this part of India (Madras Presidency) at all events a widow has no power to adopt a son to her deceased husband except by express authority given by him in his lifetime or by will." Their Lordships must have forgotten that a widow in the Madras Presidency can and does make an adoption with the assent of the sapindas and without any authority from her husband. In *Abdul Aziz* v. *Appayasami Naick* [2] the judgment of the Judicial Committee delivered by Sir Andrew Scoble contained a passage that execution sales of impartible *Zamindaries* prior to *Sartaj Kuari's case* [3] should be construed in the light of the case law as it stood at the time of the auction sale and it was immediately followed by at least half a dozen expensive and speculative litigations reviving ancient controversies that had long been buried.

The Judicial Committee are probably not aware how much their judgments are interpreted or sought to be interpreted by the ingenuity of the Bench and the Bar in India and how fanciful and ingenious interpretations are occasionally placed on them by Indian courts. *See Srinivasa Sarjerbw* v. *Batvant Venkatesh* [4] where the Bombay High Court interpreted the dictum of the Privy Council in *Umarkhan* v. *Niazudin* [5] about the inapplicability of Art. 118 of the Limitation Act to suits for *possession* as referring to adoptions among Mahomedans and not to Hindus and *Vythinatha Iyer* v. *Yeggianarayana Iyer*[6] where the dicta of the Privy Council in the *Jaggampet case*[7] and in *Jogeswar Naraina Deo's case* [8] have been construed as recognising a right by birth in property inherited from the maternal grandfather. If their Lordships realised the supreme value that is attached to every word of their judgment, to the things omitted as to the things mentioned, they might

1. (1914) 26 M.L.J. 411.
2. (1903) I.L.R. 27 M. 131.
3. (1888) I.L.R. 10 A. 272.
4. (1913) I.L.R. 37 B. 513.
5. (1912) I.L.R. 39 C. 411. S. C. 22 M.L.J. 240.
6. (1903) I.L.R. 27 M. 382.
7. (1902) I.L.R. 25 M. 678.
8. (1896) I. L. R. 23 C. 670.

lay down the law with more fulness and precision than they are latterly in the habit of doing, especially when points of Indian Statute Law and Hindu Law are concerned. We are afraid that the latest decision in *Mrs. Besant* v. *Narayaniah* [1] is an illustration of the tendency towards obscurity and uncertainty, unsettling the law rather than towards clearing up difficulties and doubts so as to settle the law.

There are some points which appear to be decided in this case by the Privy Council as regards which there can possibly be no difference of opinion. It is not easy to see how Mr. Justice Bakewell in the 1st Court and how the learned Judges in the Appellate Court thought that they could appoint the father as the guardian of the boys either under S. 7 of the Guardians and Wards Act 1890 or otherwise. The suit for the recovery of the boys was filed in the Chingleput District Court and was transferred to the Madras High Court as a Court of Extraordinary Original Civil Jurisdiction, under S. 13 of the Letters Patent. The Letters Patent do not provide for transfer of applications not being suits and there was no application before the Chingleput Court under S. 7 of the Guardians and Wards Act 1890 for the appointment by the Court of the father as guardian. Lastly if S. 7 applied, it is quite clear as the Privy Council point out, that S. 19 Cl. (*b*) prevents the Court from appointing any guardian for a boy whose father is living and is not unfit to be guardian.

The appellate Judges in the High Court however sustained the order appointing the father as guardian under the *general* jurisdiction of the High Court under the Letters Patent and not under the Guardians and Wards Act. The Privy Council have raised two objections to the course: 1st that the appointment should not have been made without seeing that the infants were properly represented and their interests adequately considered; 2nd that the 19th Section of the Act of 1890 was a bar. The latter objection, it is submitted, is clearly untenable. S. 19 of the Guardians and Wards Act applies only to the District Court and to the High Court when it acts under the powers conferred by the Guardians and Wards Act in the exercise of its Ordinary Original Civil Jurisdiction (see S. 19 and the definitions in S. 4 sub.

1. (1914) 27 M. L. J. 30.

sec. (4) & (5)). It does not affect the general jurisdiction of the High Court which it may have apart from the Guardians and Wards Act. (See S. 3 of the Act). We are inclined to consider however that the order of the High Court was erroneous even under its general jurisdiction. In the exercise of such jurisdiction, it has power to appoint guardians of minors who are European British Subjects even outside the Presidency Town and of all minors within the Presidency Town. The Supreme Court had, it is submitted, no jurisdiction over Hindu infants outside the Presidency Town so far as the appointment of a guardian of the person was concerned. *See In re Srish Chunder Singh*[1] and Trevelyan on Minors 135. If however there was such jurisdiction the decision in *Jairam Luxmon*[2] and *Re Jagnnath Ramji*[3] show that the father could be appointed guardian of his own sons under S. 17 of the Letters Patent and S. 19 of the Guardians and Wards Act would be no bar.

Again the view taken by Mr. Justice Bakewell and the appellate court that in a suit transferred from the Chingleput District Court to the High Court, the High Court had all the powers that it would have if the suit had been instituted on the original side of the High Court is manifestly untenable and the Privy Council have rightly rectified the error into which the High Court fell.

Thirdly, as regards the relief that should have been asked for in the plaint that was instituted, there can be no doubt that the Madras High Court was wrong and the Privy Council right. The suit should have been for an order compelling the defendant to concur with the plaintiff in taking steps to regain the custody of the boys who were in England. That was the form which was held to be the proper one in *Hope* v. *Hope*[4] and it is not easy to see how the boys who are in England are to be regarded as chattels to be handed over by the defendant to the plaintiff.

Coming now to the other points dealt with in the judgment, we must take it that the Privy Council decided that the District Court of Chingleput had no jurisdiction to try the suit and therefore they dismissed the suit on the ground of want of

1. (1898) I. L. R. 21 C. 206. 2. (1892) I. L. R. 16 B. 634.
3. (1898) I. L. R. 19 B. 96.
4. (1854) 43 E. R. 534. S. C. 4 Deg. M. & G. 28.

jurisdiction. On this point one would expect a clearer pronouncement and a closer reasoning than one is able to gather from the judgment. All that is said is "the District Court in which the suit was instituted had no jurisdiction over infants except such jurisdiction as was conferred by the Guardians and Wards Act 1890. By the 9th section of that Act the jurisdiction of the Court is confined to infants ordinarily resident in the District. It is in their Lordships' opinion impossible to hold that infants who had months previously left India with a view to being educated in England and going to the University of Oxford were, ordinarily resident in the district of Chingleput" The 9th section of the Act relied upon by the Privy Council has, it is submitted absolutely no application to the case. The suit was not for the *appointment* by the District Court of anybody as guardian, but was a suit for the declaration of the legal rights of the father as natural guardian and for a direction to the defendant to restore the boys to his custody. If the suit in the Chingleput District Court was treated as an application to appoint the father as guardian it would be obnoxious to the provisions of S. 19 even if the boys ordinarily resided in the District of Chingleput. The matter seems to be involved in confusion and it is not easy to extract from the judgment of the Privy Council the reasons for the conclusion that was arrived at. Probably their Lordships thought that the Guardians and Wards Act was an exhaustive Code and if it did not provide for the case that has happened, then there is no remedy at all. That, however, would not be a case of want of jurisdiction, but a case of no cause of action. It would be a disastrous conclusion and there is nothing to indicate that the Privy Council intended to go so far as that. It would be a curious procedure if in every case where custody of the boys is sought a father were compelled to apply for the appointment of somebody as guardian when he is himself not unfit, an application moreover which the Court has no power to grant having regard to the provisions of S. 19 of the Act. We are therefore, with all respect to the Privy Council, unable to see that the reference to S. 9 has any relevancy or meaning. Possibly the Privy Council had in mind the objection raised in the Courts below founded upon S. 25 of the Guardians and Wards Act 1890. We are certainly inclined to prefer the view taken in Allahabad[1] and

1. (1914) I. L. R. 26 A. 594.

Punjab to that taken in Madras & Bombay[1], *viz.*, that S. 25 of the Guardians and Wards Act provides an exclusive remedy for cases which fall within the words of the section and that no civil suit will lie in such cases but only a summary application under the Act. But we think what has been overlooked is that that Section has no application to the case. The language of the section is not apt to cover a case like the one before the Privy Council where a father or guardian entrusts the custody of his boys or wards to some other person for a definite period or for a specified purpose and afterwards seeks to revoke the arrangement and to reassert his right. Such a case can and must plainly be the subject of an ordinary civil suit. And the Privy Council, it is respectfully submitted, went too far when they said that "the District Court in which the suit was instituted had no jurisdiction except such jurisdiction as was conferred by the Guardians and Wards Act 1890." No doubt if S. 25 of the Guardians and Wards Act applied to the particular case the District Court of Chingleput could have no jurisdiction. The word 'Court' in S. 25 must be interpreted according to S. 4 sub-sections 4 and 5 and the result is the jurisdiction of the District Court under the Guardians and Wards Act is for this purpose confined to infants ordinarily resident within the district, and there can be no difficulty in agreeing with their Lordships' conclusion that the infants were not resident within the District.

But the real question is had S. 25 any bearing upon the suit which was instituted in the District Court of Chingleput. It could not be said that the defendants custody was not legal custody. As long as the arrangement stood it was a valid custody and it is impossible to see how the language of S. 25 can be held to cover the case. A civil suit therefore did lie and the Dt. Court of Chingleput was in that view the appropriate Court. Ss. 16 and 19 of [Act V of 1908] the Code of Civil Procedure not applying, S. 20 determines the forum and the test was whether the defendant was residing within the jurisdiction or the cause of action whether wholly or in part arose within the District of Chingleput. As was pointed by Lord Cranworth L. C. in *Hope* v. *Hope*[2] . " It may be that the child is placed under such circumstances that the jurisdiction of the Court cannot be

1. (1905) I. L. R. 25 B. 571 & (1885) I. L. R. 9 M. 35.
2. (1854) 43 E. R. 534 at 541.

exercised over it [because no order I might issue could be enforced. But in that case there is not a want of jurisdiction but a want of the power of enforcing it. If, for instance, where an adult Englishman contracts for the purchase of an estate and goes out of the jurisdiction, no body can doubt that I may decree specific performance but of course the Court can have no control over the purchaser if it has no means of reaching him. So with an infant abroad, if the parents were also abroad and the infant had either no property or the property was likewise abroad, I should never say that I had no jurisdiction over the infant if it was a British born subject of Her Majesty, though I might have no means of enforcing the jurisdiction. Therefore, it is putting the matter on a wrong footing to say because the child is out of the jurisdiction, that the Court has no jurisdiction. In such a case any body might by merely withdrawing himself from the jurisdiction escape all liability to it." While it can reasonably be held that the Guardians and Wards Act is exhaustive to the extent to which it goes, it is impossible to come to the conclusion that in cases for which there is no provision in the Act there is no remedy even if the Court should come to the conclusion that there is a wrong to be redressed. Assuming even that S. 25 can be strained and applied to a case like the present, if the boys are not resident in British India then there is no way of obtaining relief in any Indian court.

It is submitted that the sound conclusion is that, as the Privy Council said, the suit was misconceived and should have been to direct defendant to concur with plaintiff in taking steps to recover the boys and that such a suit would properly lie in the District Court of Chingleput where the cause of action arose and where the defendant was residing. And the Privy Council were certainly right in pointing out that the wishes of the boys should ordinarily be ascertained and cannot be completely ignored, though authority is not wanting for the view that it is not an invariable and inflexible rule. All the English decisions go as far as that and we do not see how such a principle is inconsistent with the Hindu Law. There can be no doubt that a Hindu father cannot release his rights to control the religious education of his minor children which is given to him by Law

for the benefit of his children. But we think it is contrary to Hindu Law, to say that a Hindu father has any right to agree that his children shall be brought up in a religion different from that in which they are born, The English law does not appear to be different *Andrews* v. *Salt.*'[1]

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The Privy Council have carefully refrained and we refrain from pronouncing on the merits to any extent or in any way. The case of *Lyons* v. *Blenkin*[2] is a case essentially different from that before the Privy Council. There was a settlement which gave property to the minors and which provided for their education. Assuming that the principle of that case can properly be extended to the case of Hindus who entrust the custody of their boys for University Education in England, we are inclined to think that some limitations should be imposed. When property is settled on a minor and education in a particular way is provided for, that may well be a case in which the principle of *Lyons* v. *Blenkin*[2] can be extended to Indians. If there is no legal obligation imposed upon the person to whose custody a boy is entrusted to complete his University Education in a foreign land the principle of that case should not be applied. Further, in adapting the English rule to Indian conditions and stating it as a rule of Hindu Law it is impossible to agree that the Hindu Law can recognise as valid an arrangement by which the educational or other control in respect of Hindu children is transferred to a non-Hindu. The contrast between the Hindu and English civilisations is so great that English cases dealing with the waiver of the right of an English father or mother in favour of a member of his or her own community more or less controlled by a homogeneous civilisation cannot be extended to quasi-family relations as between Hindus and Europeans or as between Hindus and Mahomedans although the principle might well be applied as between Hindus and Hindus. While therefore the interests of the children should be the paramount consideration and when they have attained to years of discretion their wishes should ordinarily be consulted, it cannot be regarded as a principle of Hindu law that a Hindu can entrust the custody and education of his children in such a way as to

1. (1873) L. R. 8 Ch. A. at p. 636. 1. (1820) 37 E.R. 842 sc. Jacob 245.

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waive his right in favour of a person who is not a Hindu. There is nothing in the Hindu law books which warrants the opinion of the Privy Council that there is no difference in this respect between English and Hindu law. In laying down for the first time, a rule of this description on a point of Hindu family law which is fraught with consequences which may seriously affect the family and religious lives of Hindus, the courts are really laying down what the law ought to be and there is no reason why the law should not be so declared as to be consistent with progressive ideas and some measure of liberty on the part of Hindu minors as well as with the necessity that exists for preventing acute conflicts between vitally different religions or different civilisations.

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SUMMARY OF ENGLISH CASES.

In re **Wimperis, Wicken** *v.* **Wilson,** 1914, 1 Ch. p. 502.

Married woman—Bequest of an annuity for separate use without power of anticipation,—Disclaimer—Married Woman's Property Act, 1882, s. 1.

After the Married Woman's Property Act, a married woman is entitled to disclaim a bequest of an annuity to her for her separate use before accepting the bequest even though she is restrained from anticipation.

Prior to the Married Woman's Property Act in the case of a legacy to a married woman, she was not the only person entitled to the legacy. Her husband might reduce it into possession. In the case of a bequest for her separate use, she could even prior to the Act have disclaimed it as a *feme sole.*

It follows necessarily from S. 1 of the Married Woman's Property Act 1882, which provides that a married woman is capable of acquiring property, that she must have the power to refuse or disclaim the property as a *feme sole.*

A restraint on anticipation applies only if she acquires the property; and there is nothing in the provisions of the Married Woman's Property Act to prevent her from disclaiming the property to which if not disclaimed, the restraint on anticipation will attach.

In re **Sir William Miller.** *In re* **Sir James Miller, Bailie** *v.* **Miller** 1914 1 Ch. p. 511.

Conflict of Laws—Instrument in Scottish form—Comprising land in England and Scotland—"Heirs male of the body in fee"—Confers an estate in Tail male with reference to lands in England.

A trust disposition in Scottish form comprising lands in England and Scotland by which the trustees are directed to hold the land "for behoof of my Eldest Son, James Percy Miller and the heirs male of his body in fee creates an estate in tail male with regard to lands in England, though according to Scots Law the terms are ineffectual to create a strict entail or anything which can be described as an estate according to the rules of English law. The incidents of the estate which can be created in English land must be determined by the law of the country where the land is situate and not by the law of the country where the testator is domiciled or where the will is made.

The observations of Lord Selbourne L. C. in *Studd* v. *Cook*[1] referred to.

In re **Lancashire and Yorkshire Bank's Lease. W. Davis & son** *v.* **Lancasthire & Yorkshire Bank,** 1914 1 Ch. p. 522.

Landlord and Tenant—Lease for 5 years—Determination after notice after the expiration of 3 years.—Construction—Notice Validity.

Where a shop was demised by the defendants to the plaintiff for a term of five years from March 25, 1911, and the rent was made payable by equal quarterly payments on June 24, September 29, December 25 and March 25 in every year; and there was a provision in the following terms. "And it is further agreed and declared that after the enpiration of the first three years of the term hereby granted, if the lessees shall desire to determine this lease, and shall give to the lessors six calendar months' previous notice in writing of such their desire, such notice to determine on anyquarter day &c.," the lease shell be determined. The plaintiffs gave notice on 14th November 1913 determining the tenancy as from June 24, 1914.

1. (1883) 8. A. C. 577 at p. 591.

Held following *Gardener* v. *Ingram*[1] that the notice can be given only after the expiration of 3 years and the earliest day on which the lease could be terminated was September, 29, 1914.

His Lordship. (*Eve. J.*) stated that if the question of construction were free from authority, he was by no means certain that the decision would take the form that it had taken on account of the authority.

[Ed. See *Ramasami Naidu* v. *Venkataramanjulu Naidu* [2], where a similar question of construction of a lease came up before the Madas High Court.]

In re **Pacaya Rubber and Produce Company, Limited. Burns Application**, 1914 1 Ch. p. 542.

Company—Prospectus—Expert, Report—Statements based thereon—Basis of contract—Rescission.

Where a company issued a prospectus offering shares for public subscription and it contained extracts from the report of an expert headed as such as to the state of the Company's undertaking which was found to be wrong and misleading in material particulars there being no question of fraud on the part of the Company or the expert, such statements are the basis of the contract between the Company and the applicants for shares. The applicants will be entitled to rescind the contract as on a misrepresentation on a material question of fact, unless the Company makes the applicants distinctly to understand that the statements of the expert are not vouched to be correct by the Company.

The observations of Lord Cairns and Turner L. J. in *In re Reese Silver Mining* Co.[3] referred to and followed.

In re **Brookes, Brookes** *v.* **Taylor**, 1914 1 Ch. p. 558.

Trustee—Liability of—Judicial Trustees Act 1896 (59 and 60 Vict. Ch. 35) S. 3—Mortgage security—No suspicion of jeopardy —Appropriation of mortgage to a share—Mortgage in fact worthless.

The trustee under a will retained £ 750 to answer to settled shares amounting £ 375 apiece and he distributed £ 375 to the

1. (1889) 61 L. T. 729. 2. (1914) 26 M. L. J. 467.
3. (1867) L. R. 2 Ch. 604 at pp. 611 to 615.

persons entitled to a share and retained a mortgage for £ 350 and £ 25 in cash for the other share, the trustee being paid interest regularly and having no suspicion that the mortgage was in jeopardy. When the trustee took steps to realise the security it was found that the security was practically worthless and the mortgagor had no assets. The persons entitled to the other share brought an action against the trustee seeking to make him liable for the breach of trust, in handing over practically the entire trust estate to the persons entitled to one share, *Held*, the trustee is liable for breach of trust, because he has chosen without any inquiry as to the value of the securities to hand over what was in fact the whole estate to one family, leaving the other family with a security of no value whatever. The trustee has not acted reasonably and ought not fairly to be excused under the Judicial Trustee Act 1896 s. 3.

Green & Sons (Northampton) Limited *v.* **Morris,** 1914. 1 Ch. p. 562.

Goodwill—Assignment to trustee for the benefit of creditors—Whether original owner can solicit former customers.

The general principle that if a man sells the good-will of his business to a purchaser and receives the purchase money, he cannot afterwards destroy that which he has sold by soliciting his old customers, affirmed by the House of Lords in *Trego* v. *Hunt*,[1] does not extend to any case except that of a sale or of some contract equivalent to a sale. The rule does not apply to the case of a debtor who assigns his properties to a trustee for the benefit of his creditors.

Where a firm was unable to meet its creditors and the partners assigned all their property to a trustee for the benefit of the creditors and the plaintiff purchased the good will of the firm from the trustee, *Held* the plaintiff was not entitled to an injunction against the original owners of the goodwill restraining them from soliciting their old customers.

In re **Sandwell Park Colliery Company, Limited,** 1914 1 Ch. p. 589.

Company—Reconstruction—Sale for shares in a new Company—Provision made for shares of dissenting members—Companies Consolidation Act 1908, S. 120.

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1. (1896) A. C. 7.

Under S. 120, an existing Company can be reconstructed by being wound up and its assets being sold to a new Company, if proper provision is made for the interest of the dissenting members in the existing Company.

In re General Motor Cab Co[1] *distinguished.*

In re **Parke's Settlement. Fran** *v.* **Bruce**, 1914 1 Ch. p. 595.

Settlement—Real property—Bachelor for life, Remainder to his widow—Remainder to their issue—Limitation to issue void—Definition of the rule.

Where real property is limited to a person, a bachelor for life with a remainder to his widow and remainder over to their issue; the limitation to the issue is void as infringing "the rule against limiting land to an unborn child for life with remainder to his unborn child." The rule is more accurately stated as above than as commonly given, "the rule against double possibilities."

The observations of *Farwell L. J.* in *In re Nash*[2] followed.

W. H. Bailey & Son Limited *v.* **Holborn and Fascati, Limited**, 1914 1 Ch. p. 598.

Easement—Light—Interference—Acquiescence of interference by others—Abandonment—Mandatory Injunction.

Where there are two properties adjoining a dominant heritage against which the latter has an easement of light and the owner of the dominant heritage allows the owner of one of the properties to build on his land so as to cause obstruction to the light on the dominant heritage on receiving a sum of money from the owner of the servient tenement and the owner of the other servient tenement sought to build on his land so as to shut out light from the dominant heritage.

Held, that an abstraction of light coming over adjoining property acquiesced or consented to by the owner of the dominant tenement does not entirely negative his right to an easement of light over other adjoining property, though it does not give him any further right over that second adjoining property so as to prevent the erection of a building which he could not have prevented had he not consented to the prior abstraction of light over the first adjoining property.

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1. (1913) 1 Ch. p. 377.
2. (1910) 1 Ch. 1 at pp 9 and 10.

His Lordship (*Sargant J.*) refused a mandatory injunction and only awarded damages in view of the fact that the owner of the dominant tenement had shown by accepting a sum of money formerly that he did not consider the preservation of the full light to their windows ; a matter of vital importance.

There is no difference between the case where the owner signs and hands to a broker and leaves in his hands a document so signed and the case where the holder of a document signed by the registered holder puts it into the hands of his broker or the case where the true owner never having had possession of the document but knowing it to be in such condition that the broker can deal with it, allows it to remain in the broker's possession and thereby enables the broker to part with it to another who takes it on the faith of the apparent authority of the broker to deal with it.

Wiffen *v.* Bailey and Romford Urban Council (1914) 2 K. B. 5.

Malicious prosecution damages necessary to support action for—Offence charged to be punishable with imprisonment—If misdemeanour—Action maintainable, though special statute providing only fine—Slander—Damage necessary in action for—Offence imputed to be criminal—Public Health Act 1875, S. 95.

If an offence is one which would be punishable by fine and imprisonment, as amounting to a misdemeanour at common law, apart from the special remedy by summary proceedings provided by the statute creating the offence such offence is one of a criminal nature in respect of which an action for malicious prosecution will lie though the special statute provides only for the imposition of fine.

An action for malicious prosecution will not lie in the absence of proof that plaintiff sustained one of three kinds of damage, *viz* (1) damage to a man's fame as if the matter whereof he is accused be scandalons (2 damage to his person as where he is put in danger to lose his life, limb or liberty (3) damage to his property as where he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused.

For the purposes of an action for slander the offence imputed must be one punishable with imprisonment.

Proceedings before Justices against the plaintiff under S. 95 of the Public Health Act 1875 for non-compliance with a notice

to abate a nuisance is a proceeding involving damage to his fair fame sufficient to support an action for malicious prosecution.

Colding v. John Moulem and Company Ltd. (1914) 2.Q.B.61.

Election of remedies—Principle of—meaning.

The principle as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal Act—an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.

There cannot be an election without knowledge of the right to elect.

Godding. *In re* **The Trustee ex parte.** (1914) 2. K. B. 70.

Execution—When complete—When execution creditor entitled to retain money received for bankrupt against trustee in bankruptcy.

Where the goods of a debtor had been seized in execution and the latter had paid up the amount of the debt to avoid a sale directly to the execution creditor and also paid the sheriff's charges and thereupon the execution was withdrawn and the debtor became bankrupt 9 days after, held that the execution had not been completed and the execution creditor could not as against the trustee in bankruptcy retain the money received by him from the debtor and that in order that the execution could be said to be complete only when there is a seizure and sale.

Papworth v. Battersea Corporation. (1914) 2 K. B. 89.

Public authority—improper discharge of statutory duties—injury—liability to person suffering injury to pay damages.

The true view of the position of a public authority which undertakes statutory duties is that if a duty is undertaken and is

improperly performed and actual damage is occasioned thereby the person injured has a perfectly good cause of action.

Jolly. v. Brown. (1914) 2. K. B. 109.

Landlord and Tenant—Breach of Covenant to repair by tenant—notice by landlord under conveyancing and Law of Property Act 1881 S. 14. Sub-s. I — requisites—to specify 'particular breach.'

The requirements of a sufficient notice under the conveyancing and Law of Property Act 1881, S. 14., Subs. 1, which the landlord is bound to give to the tenant to entitle the former to enforce a right of re-entry in the lease for breach of the covenant to repair by the tenant, considered. *Buckley and Kennedy, L. J.J. Held* that the notice in the particular case was good while *Vaughan Williams, L. J.* differed.

Per *Buckley L. J.* The lessor is bound to specify the particular breach complained of and is not bound to give particulars of the breaches. It is no objection that he leaves it to the tenant to find the particular defects in that condition of the premises to which the tenant's attention is called. The notice must be one which calls the tenant's attention to the particular condition of the premises which is alleged to be defective. It need not identify every defect in theconditions to which attention is called.

Per *Vaughan Williams L. J.* The notice must specify each particular breach complained of and require tha breach to be remedied, It is not a compliance with the statute to serve on the tenant a notice bidding him, in effect to find out where there are any breaches of covenant and if there are, to remedy them.

Fuller v. Glyn, Mills Currie and Co. (1914) 2. K. B. 168.

Estoppel—Real owner of shares leaving share certificate in broker's hands—Pledge by broker with his banker—Apparent authority—Banker taking bona fide—Real owner estopped from disputing title of banker—Duty of banker to inquire.

The mere fact that a broker brings a block of securities and pledges them with a banker against his general account and allows them to remain as security for a considerable time is not sufficient to put the banker on inquiry as to the limit of the broker's authority to deal with the securities.

A person who places in the power and disposition of another an instrument which carries a representation of authority to that other person to deal with and which when produced to a third person, will convey to that third person that such authority exists is estopped from disputing the title of one who takes the document in good faith and for value.

Oelkers. v. Ellis.(1914) 2. K. B. 139.

Fraud—Relief on the ground of—limitation applicable—discovery of fresh cause of action—application of statute of limitations to equitable remedy.

When once fraud is established the rights of the defrauded party are not affected by the Statute of limitations so long as he remains in ignorance of the fraud and no active concealment on the part of the defendant is necessary to be alleged or proved. The plaintiff on discovering the fraud has six years to bring his action in equity on the analogy of the Statute of Limitations. A fresh cause of action accrues from the moment that the fraud is discovered and to that fresh cause of action the Statute of Limitations will be applied by courts of equity.

Norman v. Great Western Railway Co. (1914) 2 K.B.153

Railway company—duty to public resorting to premises of—contributory negligence—question for jury—if based on evidence, Court's power to interfere with verdict.

A Railway company is under a higher duty than that which the law imposes on the owner of private premises. In the latter case the duty is created by the invitation. If the invitee chooses to enter he takes the premises as he finds them subject to this that if the invitor knows of a danger which is not so obvious as become known to the invitee also then the invitor must take reasonable means whether by notice, guarding, lighting or otherwise to prevent injury to the invitee arising from the danger. But a Railway Company which carries on not merely a private business for its own benefit but an undertaking in which the public are interested and of which they are entitled to avail themselves, is under a duty to the public, not because of any invitation, but apart from invitation to afford proper and reasonable accomodation to the persons

who come to do business with them. Railway companies have a monopoly and statutory privilege; they come under a corresponding duty to all persons to whom the companies owe and are bound to render services to take reasonable care that their premises are safe. *Per Bray J.* The question whether there was contributory negligence is one for the Jury. If there is evidence for the verdict of the Jury the Court has no power to interfere.

Morgan. v. Hart. (1914) 2 K. C. 183.

Receiver—appointment of, by way of equitable execution—Power of court prior to and after Judicature Act—Judicature Act of 1873, S. 25 Subs. S. 8.

Before the judidicature Act a receiver could be appointed in aid of a judgment at law only when the plaintiff showed that he had issued out the proper writ of execution and was not by certain difficulties arising from the nature of the property which prevented his obtaining possession at law and otherwise.

Even ofter the Judicature Act the law is the same, S. 25 Sub-Sec. 8 of the judicature Act 1873 not giving to the courts either of law or equity any wider jurisidiction than existed before but only enabling such order as could be made before to be made in any proceedings without commencing special proceedings in the Court of chancery such as were necessary before the Act.

Where the debtor has property which could be reached by a Fi Fa, the fact that there is a difficulty in identifying it on account of its having got mixed up with other people's goods does not confer on the Court Jurisdiction to appoint a receiver as the order if made would not be for purposes of execution but only to keep the property where it is until the plaintiff can get discovery.

Lucy v. Bawden. (1914) 2 K. B. 318.

Negligence—duty of premises in possession and control of common stair case.

A landlord remaining in possession and control of a common stair case of premises all the parts of which had been let out to various persons, still owes a duty in respect of the staircase to all the persons lawfully using the same.

The duty is not larger than the duty of an occupier of premises to those whom he invites to enter his premises for the purposes of lawful business *viz* that the visitor using reasonable care on his part for his own safety is entitled to expect that the occupier shall, on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know.

Tayler *v.* National Amalganated Approved Society. (1914) 2 K. B. 352.

Practice—appeal from County Court—none, on point not raised before county Court relating to jurisdiction of Country Court Rule still applicable—Statute—Construction—Ouster of jurisdiction of Court.

A statute providing that disputes between a society and a member shall be decided by arbitration does not remit to arbitration the question whether a person is or is not a member.

The rule that there is no appeal from a decision of the Country Court except on a question of law raised in the County Court is equally applicable even when the question relates to the jurisdiction of the County Court.

Reeves *v.* Pope. (1914) 2 K. B. 284.

Set off—Personal claim for damages against lessor—Not avoidable against mortgagee in possession from lessor claiming rent from lessee—what equities binding on transferee of p:operty.

A personal claim by a lessee of certain premises for damages for breach of a covenant to complete a building by a certain time entered into by him with his lessor, the claim for rent relating to a period subsequent to the mortgage. The claim for damages is not an interest in property and cannot be set up against a transferee from the lessor, who would be bound by equities avoidable against the lessor only when such equities were in the land.

JOTTINGS AND CUTTINGS.

A Testator's Poor Opinion of Lawyers. The late Ezra C. Bartlett, who died in New york in 1912, in his last will and testament, had this to say regarding Lawyers.

" I hereby particularly warn you against Probate Judges and Attorneys at Law, and sincerely trust you will not have occasion to consult or employ the latter in regard to this instrument. My personal experience in dealings, social and otherwise, with lawyers has been extensive, and careful observation in other instances has convinced me that they are all dangerous crooks, only disguised, and expressly educated and trained to obtain one's confidence in order that they may defraud and rob with impunity.

Green Bag.

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A double kindness. A Chicago man tells of two elderly men, both clothed in sober black, who were sitting side by side in a street car. Each was reading a morning paper. Suddenly one of them uttered an exclamation of pleasure and the other peered at him over his glasses.

"This paper states," explained the first, with beaming face, "that Mr. Smith, who died last week, has left his entire fortune to various charitable enterprises. This will be a surprise to his many relatives. It is to me, since I am the pastor of a church to which he has left $15,000."

The second man looked at the article, and his face, too, became wreathed in smiles. " Heaven bless him !" he exclaimed. " All to charitable institutions, in spite of his relatives! Ah, sir, I like to see money left like that ! "

" Then you, too, are a clergyman ?"

"No, Sir; I am a lawyer,"

—Ibid.

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Commenting on the recent case of *Bebb* v. *The Law Society* Green Bag says: The altered relation of women to trade and the professions does unquestionably constitute a new modern usage or custom which the law cannot ignore. It need not follow, however, that this custom has so fully established itself as to affect the legal professions, as it has some other professions,

and the Court of Appeal, if it had chosen to give it consideration, would not have had to decide in favour of the admission of women as solicitors. It could have said : "We are not led, by a survey of the situation now existing, to conclude that there has been any definite change in the custom of the realm with regard to the relation of women to the legal profession, notwithstanding certain tendencies, that seem to be in that direction ; these tendencies, in our judgment, have not had such an unmistakable result that we should deem ourselves at liberty to affirm the right ef women to practise law; by doing so we should be substituting a custom of our own choosing for one already existing, and that we have no power to do."

Instead, the Court of appeal followed those widely prevalent methods of precedent-worship which glorify ancient usage and abominate contemporary realities. The decision really hinges upon a casual dictum of Lord Coke which he may have borrowed from the Mirror of Justices. It is penetrated by the mistaken assumption that the common law is an inflexible system, rather than one in a state of unceasing growth and change.

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Justice in the Philippines. An officer of the war Department, who has seen service in the Philippines, tells a curious story as to the native ideas of justice in those Islands.

An American had come home one day just in time to witness a thief in the act of climbing out of a window with the better part of the American's wardrobe. The latter gave chase so earnestly that the thief was finally obliged to drop the clothing so that he might run the faster. He soon disappeared from sight. The American gathered up his belongings. Just then along came a native police man who proceeded to place the American under arrest, since he acted in a most suspicious manner.

To the local Magistrate before whom he was haled, the American told his story very plainly and emphatically. When he had concluded, the Filipino judge said; "you are dismissed, but you may leave the clothes here:"

"Why?" demanded the American.

"For this reason," answered the magistrate, with the air of a sage. "That it is uncertain that you speak the truth. When the thief returns to identify these clothes as the one's he stole, you may have them."

The Green Bag.

An Astute client. In Vermont they tell the story of a brilliant young lawyer whose services were sought by a quaint old farmer of some seventy and odd years.

"Young man," said the latter. "I want to leave all I have to my wife as long as she remains my widow. After that I want everything to go to the children."

"How old is your wife?"

"Sixty-two."

"Then," suggested the lawyer, "wouldn't it be quite safe to omit the discourteous phrase about 'so long as she remains a widow?' Just leave her everything.

"I won't do it," said the old man, doggedly.

"But," argued the lawyer, "surely you don't think that the lady, now sixty-two, will marry again after your death, do you?"

Whereupon the old chap regarded his lawyer solemnly for a moment, and then added:

"Well, son, there's no telling what young chaps like you will do for the money."

—*Ibid.*

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A rule of court. A representative in Congress from a North-western state tells of a youthful lawyer who had been retained to defend an old offender on the charge of burglary. The rules of the court allowed each side one hour in which to address the jury.

Just before his turn came the young lawyer consulted a veteran of the bar who was in the court room, "How much time," he asked, "do you think I should talk in addressing the jury?"

"You ought to take the full hour."

"The full hour! Why, I thought I should take something like ten minutes!"

"You ought to take the full hour."

"Why?"

"Because the longer you take, the longer you will keep your client out of jail."

—*Ibid.*

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Sir William Grantham. A story about Sir William Grantham was that, after protesting vainly to a man who was smoking in a non-smoking railway carriage, he sought to impress the offender by handing him his card, with a threat to have the man arrested

at the next station. But the man left the compartment quickly when the train stopped, and took a seat in another compartment. Justice Grantham sent the guard to get the man's name and address so that he could be prosecuted, when the guard returned, he said.

"I wouldn't have him arrested, Sir, I asked his name and he gave me this card. You see, he is Mr. Justice Grantham, Sir."

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The American Academy of Jurisprudence. More than fifty recognized leaders of the American bar met in New york, Feb. 21 and organized the American Academy of Jurisprudence. Its purpose, in the words of James Dewitt Andrews of New York, who called the meeting to order, is the production of "a complete and comprehensive statement in systematic form of the entire body of American Law."

CONTEMPORARY LEGAL LITERATURE.

In the *Juridical Review* for February, Mr. Herbert A. Smith discusses under the heading *Persona ficta,* the source, meaning and extent of personality in corporations. Historically, he considers it distorting facts to trace legal personality in all cases to the sovereign but whatever the fact in history, so far as modern legal theory goes, the only thing that matters for the lawyers, the source of all legal personality is the Sovereign, whether the corporation is by charter or by prescription or by conforming to the Statutory requirements. He considers it futile to indulge in such speculations as whether a corporation has a group will, whether it is capable of malice and how far it could be liable for the acts of others. He deplores the importation of the word personality into discussions of law from philosophy. There is no universal criterion for imputing personality to an association which will satisfy all systems of jurisprudence or even the same system at different periods of its history. As it is, the powers of a corporation or the things for which it can be liable are purely matters of inference from the object of the association and the terms of the charter under which it is incorporated or the Act under which it is, registered. The discussion does not differ whether it is the powers of a corporate or non-corporate association that are considered. For a large number of purposes, the technical distinction between corporate and noncorporate bodies, has ceased to be of any

practical importance. Corporate ownership is after all nothing more than any of those devices by which the law regulates cases of concurrent and therefore possibly conflicting interests in the same property; in other words it is only one of the numerous species of joint ownership.

Mr. Campbell Lorimer discussing the recent House of Lords case of *Buckleton* v. *Neilbut* (as to warranty) says that the Scotch Law is the same in that matter as the English and a parol warranty may always be proved provided the whole ground is not covered by the written contract and the parol stipulation is not inconsistent with the written. The rule is not limited to contracts relating to the sale of goods. But in recognising such collateral contracts there is the danger of minimising the value of writing and the House of Lords rightly sounds the warning that a warranty should not be lightly inferred.

Mr. Samuel Willinston discussing the question of consideration in bilateral contracts, in the April number of the *Harvard Law Review*, prefers the test given by Mr. Leake, *viz.* that a promise is a good consideration when the promise if performed would be a good consideration to that given by Pollock and Langdell *viz*, that if the obligation would be a detriment to the promisor (assuming that the promise creates a binding obligation) it would be sufficient to support a contract. The test of Sir Frederick Pollock fails according to the writer, when the promise is to pay a debt to the promisor. In that case there would be a detriment to the promisee in that he cannot plead the statute of limitations but yet the promise is admittedly ineffective as consideration. He thinks it unreasonable intrinsically to regard promise of an act as of higher value than the act itself. Whatever the act promised, the contract will not be binding unless the counter-promise is binding, *e. g*, when the promisor is a minor or insane person or is given a choise to perform the promise or not. The rule that a promise voidable on the ground of fraud, is a good consideration, forms an exception to this general rule.

Mr. Samuel C. Wie explains the two theories of water right prevailing in the United states of America, the one which he calls the prior appropriation theory and the other the common law system of equal rights. The one holds ground in California and the other Western States and the other in the Eastern States.

Under the first system the man that first comes to use the water of any stream or river is entitled to use it in preference to all subsequent comers. His right was once extended to the full carrying capacity of the ditch that took the water but is now limited to the quantity beneficially used. Under this system in case of a drought water will be supplied in the order of priority. Under the other system in case of failure, the water will be equally distributed, the failure affecting all equally. This is the system recognised in England and under the code Napoleon and one suited to settled countries; the other system is eminently suited to countries newly opened as it affords encouragement to pioneering, A third system of licensing is going to be introduced in California which giving effect to the theory of prior appropriation seeks to put some check upon it.

In the May number of the journal Mr. Roscoe Pound traces the course which juristic thinking has taken in the different periods of European History as to what should be regarded as the end of law. In primitive thought whatever served to satisfy private vengeance and prevent private war was an instrument of justice. Greek philosophy soon got beyond this conception and put in its place the idea of the legal order as a device to preserve the social *status quo* and philosophers were busied in planning an ideal society in which every one was put in the right place, to be kept there thenceforth by the law. Plato's republic is an instance in point. Roman juristic thought gave practical effect to the Greek ideal by conceiving it to be the province of the state to delimit and secure the interest and powers of action which in their aggregate make up legal personality of the individual. The Roman ideal was a stationary society, corrected from time to time by a reversion to the ancient type. It finds the basis of law and Government not in enactment but in the moral spirit that is intrinsic in nature. The well-known formula of the institutes of Justinian "the precepts of right and law are three, to live honestly, not to injure another, and to give every one his due," reduces the whole end of law to three functions (i) maintenance of decency and decorum in men's outward acts (ii) securing of the interest of personality (iii) security of the interest of substance. Germanic law for a time brought back law to the primitive conception. Except for the theological version of natural law, the middle ages added nothing to juristic theory but

was preparing through philosophy for a new conception of justice which developed in the 16th and 17th centuries. The reformation period is a period so far as jurisprudence is concerned of clearing away in which the ground is prepared for the constructive work of the seventeenth and eighteenth centuries through the separation of philosophy politics and jurisprudence from theology and the establishment of a science of politics. The main purpose of the Protestant jurist theologians being to throw over the authority of the church and to set up the authority of the state, the most significant feature of their work for the jurist, is their insistence on a national rather than universal law, their attempt at replacing the universal empire of Roman Law and Canon Law by the civil law of each state. The logical result of this attitude of reformers towards church authority and their claim for each individual the right of private interpretation was the opposition of the abstract man to society which developed in the juristic thinking of the 18th century. Not that these reformers were aware of the atomistic implications of their doctrines. In its implications, the doctrine of the reformers led to the juristic theory of the eighteenth century. To reconcile the general authority of Roman and Canon Law and the common law of Christendom with the independence and equality of separate states, Spanish writers, notably Suarez turned to the idea of natural law. He joins to a theory of independent equal states, a theory of natural law from which all rules of justice of every description derive their authority and of which Roman Law and Canon Law are but expressions within their respective fields. Morals and law are identified. But this new version of universal law was an original contribution of the first moment; for one thing, it made international law possible. Then came Grotius with the appearance of whose great work in 1625, it is usual to fix the date of the new era in jurisprudence. As he expounded the new doctrine, it had two sides: on the one hand, there was a theory of limitations upon human activities imposed by reason in view of human nature, on the other hand there was a theory of moral qualities inherent in human beings or natural rights demonstrated by reason as deductions from human nature. Whereas Suarez, the divine law-maker has established the eternal and universal principles. Grotius makes reason, the measure of all obligation and the basis of all limitations. Although the theory of natural rights

led ultimately to a hard and fast scheme of individual interests beyond the reach of the state which the state was bound to secure, it had important consequences in broadening the conception of justice. The foundation of these natural rights which the law existed to maintain was soon conceived to be a compact of all men with all men and justice consisted in maintaining the terms of the compact. The trend of these theories was thoroughly individualist; law exists according to the 17th century theory only to maintain and protect individual interests. Eighteenth century juristic theory down to Kant held to 4 propositions (i) there are natural rights demonstrable by reason eternal and absolute good for all men in all times and all places (ii) Natural law is a body of rules ascertainable by reason which secures these rights (iii) the State exists only to secure these rights (iv) Positive law is the means by which the state performs this function and it is obligatory only so far as it conforms to natural law. Then came Kant who introduced another idea. According to him, the end of law is freedom of will to every one so far as consistent with freedom of all other wills. In other words, his theory marks a complete transition from the idea of justice as the maintaining of the social *status quo* to an idea of justice as securing of maximum of the individual self-assertion.

Mr. D. O. Mcgovry considers the question of *Irrevocable Offers.* Disagreeing with Professor Langdell he thinks that there is nothing incongruous in the Court disregarding the revocation of an offer when there is a contract to keep it open. In such a case, even without accepting, the plaintiff has an equally fruitful action based upon the repudiation of the contract to keep the offer open. But, excepting extraordinary cases if the "paid for" offer contemplates a unilateral contract, the rule against needless enhancement of damages requires the offeree to heed the repudiation. His only remedy in such a case, is an action for damages. In this connection the writer discusses also the question as to the remedies of the person who acts upon the offer but before he fully acts upon it the offer is revoked. He controverts the position of Pollock that in such a case the contract becomes complete as soon as the offeree commences execution though his right to recover anything for the work depends upon completion within a reasonable time. He seems to think that after com-

mencement, the position is only one of "paid for" offer, with the consequences attaching to such offer.

In the American Law Review for March-April, there is an interesting analysis of the unconscious "*process of judicial legislation*" going on in our midst. The writer shows as well as how judges make law by finding law, professing to interpret it and in applying it. The first happens when a case arises for the first time with no precedent to govern it. At any rate, there can be no doubt that by direct judicial legislation based on supposed principles of justice have been developed the bodies of law known as *quasi* contract, the common counts and the law of boycott. Principles of public policy may be seen acting in the case of the law of trade and other fixtures, the law of agency, the distinction between libel and slander and the law of privileged communications. A great deal of judicial legislation also takes place under cover of finding what is reasonable under given circumstances. The prevailing theory that judges cannot make law and the attempt at finding out precedents conceals the process that is actually going on. Analogy and reception of the principles of foreign law are also other ways in which judges make the law. The process occasionally receives a check by the sense of juristic consistency or symmetry. The relative weight of the two considerations, the desire to do justice and the desire for judicial symmetry varies with the psychology of the judge. As a president of the American Bar association once said " a judge may decide almost any question any way and still be supported by an array of cases." Judges not only make new rules but also amend old ones. The abolition for instance of the husband's power to administer moderate correction to the wife is entirely due to the courts. When all the recognised ways of law making fail, the judges have recourse to legal fictions, the principal types of which are (i) raising presumptions (ii) invention of conditions implied by law (iii) and pronouncing upon the sufficiency of evidence.

The writer has several interesting observations to make on interpretation and application of law as sources of law. He points out the necessity for sound economic and philosophical doctrines for a proper application of the law.

Mr. Percy Bell sees a lot of lawlessness in America and calls upon the legal profession which has he thinks the capacity both in the legislature and the Courts to remedy it to improve

the condition. The cumbrous procedure, the insistence on unanimity among the jury, the excessive right of appeal, the powerlessness of the Judges to control trials and the growing commercialism of lawyers who are up to taking up any case and putting forward any defence, of some of the effective causes of this state of things.

In the same number Mr. Edgar Cullen deplores the decline personal liberty in America. He sees it in the doctrine that gives the executive power to declare martial law, in the power claimed for Courts to control the press for writings likely to excite the public mind, to punish for motives, in the legislation undertaken on " Eugenic grounds, in the interests of professions and classes, in the prosecution of Christian scientists and in the corruption that prevails among the electors. There seems to be considerable resentment felt against the large power claimed for the Courts to declare legislative acts void. This theme forms the subject matter of several articles in the American Legal journals.

Another writer puts in a strong plea for what he calls " civilised commercialism " " the regulation of business despotism into a business Republic " and states certain rules for general adoption.

" Trusts based on oral promises to hold in trust convey or to devise, made by voluntary grantees " is the heading of an informing article by Mr. George Costigan in the Michigan Law Review for April. In connection with this question he considers 3 situations; first where one person pays the purchase money and has the conveyance made to another who at the time agrees orally to hold in trust for or to convey to or to devise to the payer. 2 Where a grantor conveys without consideration other than the grantee's promise to hold in trust for or to convey or to devise to a third person.

3. Where one person pays the purchase money and has the conveyance made to another who agrees orally to hold in trust for a third person.

He thinks that in all these cases, the trust should be upheld as constructive trust. In the first case, Courts have been upholding it as a case of resulting trust which the writer thinks is obviously wrong, there being an express trust though invalid. In the second case, Dean Ames is of opinion that the Court should

decree restoration of the property to the grantor on the principle of *restitution integrum.* He is not prepared to extend the principle applicable to legacies to conveyances. The writer thinks that even applying the principle of *restitution integrum,* the person to whom restoration is to be made is the intended *cestui que trust.* In the last case also, Dean Ames thinks that the property should be restored to the person that provided the purchase money while the writer thinks that the trust should be enforced in favour of the intended *cestui que trust.* The broad ground on which he puts the power of Court to so declare is that equity can raise a constructive trust whenever there is fraud and unjust enrichment of one at the expense of the other and in both the cases the person defrauded being the intended *cestui que trust.*

BOOK REVIEW.

The Provincial Small Cause Courts Act by Kedarnath Chaudhuri, Price Rs. 2-8.

It is a striking commentary on the methods of Indian legal procedure that a mass of case law should have grown up around the question whether in the trial of a small case the munsif should deal with it on the 'regular' side or on the Small Cause side. And when the Small Cause Judge, happens to be a different individual from the regular Judge, we have not infrequently seen the sad spectacle of the unfortunate litigant, being sent about from Court to Court the Small Cause Judge referring him to the regular Court and the regular Court referring him back to the Small Cause Court. But as long as this state of the law continues to exist, an up to date work on the subject is a necessary volume in every lawyer's library and we can confidently recommend Mr. Kedarnath Chaudhuri's book as the latest and the most useful publication on the subject. The collection of cases from both the authorised reports and the unofficial publications is fairly complete and the notes are well arranged under convenient headings so as to facilitate reference.